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No. 84-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL HEINRICH,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether this appeal should be dismissed because appellant's second question presented for review was not pressed or passed upon below, thereby depriving this Court of jurisdiction?

2. Whether this appeal should be dismissed because the judgment appealed from is not a final judgment within the meaning of 28 U.S.C. § 1257, thereby depriving this Court of jurisdiction?

3. Whether this appeal should be dismissed since it raises no substantial federal question which merits this Court's review?

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In The

Supreme Court of the United States

October Term, 1984

PAUL HEINRICH,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

Appellee, the People of the State of Illinois, now moves this Court to dismiss the appeal of appellant Paul Heinrich. Appellee so moves because: 1) appellant's second question presented for review was not pressed or passed upon below, thereby depriving this Court of jurisdiction; 2) the judgment from which appeal is sought is not a final judgment within the meaning of 28 U.S.C. § 1257, thereby depriving this Court of jurisdiction; and 3) the appeal does not present a substantial federal question worthy of review by this Court.

I.

THIS COURT LACKS JURISDICTION TO CONSIDER APPELLANT'S SECOND QUESTION PRESENTED FOR REVIEW, SINCE HE FAILED TO PRESENT THAT QUESTION TO THE ILLINOIS SUPREME COURT.

Appellant's second question presented for review is "[w]hether the First Amendment permits a state to criminally proscribe *true* statements of fact as fighting words or breach of the peace where the speech was not uttered in face-to-face confrontation?" (Jurisdictional Statement at i) The Illinois Supreme Court did not rule on this question (*See, People v. Heinrich*, 104 Ill. 2d 137, 470 N.E.2d 966 (1984)), because appellant did not raise it in that court. Rather, he challenged the constitutionality of the criminal defamation statute, *Ill. Rev. Stat.* 1983, ch. 38, pars. 27-1 and 27-2, on the ground that it is unconstitutionally overbroad inasmuch as it contains no requirement that the defamatory communication tend to provoke an *immediate* breach of the peace. The immediacy issue was argued to the exclusion of any claim that a face-to-face confrontation is constitutionally required. The first mention of such a requirement comes in the petition for rehearing. Since Illinois Supreme Court Rule 341(e)(7), [*Ill. Rev. Stat.* 1983, ch. 110A, par. 341(e)(7)] prohibits raising points for the first time in a petition for rehearing, the court below was precluded from considering whether face-to-face confrontation is required.

Because appellant's second question presented for review was not raised or passed upon below, it is not within this Court's jurisdiction. *Illinois v. Gates*, ____ U.S. ____, 103 S.Ct. 2317 (1983).

II.

THIS COURT LACKS JURISDICTION, SINCE THE JUDGMENT OF THE ILLINOIS SUPREME COURT IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257.

On May 11, 1983, appellant was charged by information with two counts of criminal defamation, in violation of *Ill. Rev. Stat.* 1983, ch. 38, par. 27-1. The Circuit Court of McLean County granted his pre-trial motion to dismiss the charges on the ground that the statute, which provides that truth is an affirmative defense only when communicated with good motives and for justifiable ends (*Ill. Rev. Stat.* 1983, ch. 38, par. 27-2), is unconstitutional under the First and Fourteenth Amendments. The Illinois Supreme Court reversed, finding that the statute applies only to speech which tends to incite an immediate breach of the peace, and that the qualified truth defense is not inconsistent with this Court's First Amendment decisions. The case was remanded for trial. *People v. Heinrich*, 104 Ill. 2d 137, 470 N.E.2d 966 (1984). Appellant now invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(2).

The jurisdiction conferred by § 1257 to review state court decisions is limited to "[f]inal judgments" of the highest court of the state in which a decision may be had. Generally, the finality requirement precludes review in this Court where further proceedings in the state courts, other than those of a ministerial nature, are ordered by the judgment from which appeal is sought. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In criminal cases, a judgment is ordinarily not final, within the meaning of § 1257, unless it includes the imposition of a sentence. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981); *Bateman v. Arizona*, 429 U.S. 1302, 1306 (1976) (Rehn-

quist, J., Circuit Justice); *Parr v. United States*, 351 U.S. 513, 518 (1956). Here, appellant has not yet been tried, convicted, or sentenced.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court recognized that under certain limited circumstances, state court judgments are treated as final despite the fact that they are interlocutory in nature and call for further substantive proceedings to take place. Four categories were identified and described. However, the Court observed that "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date . . ." 420 U.S. at 477. Such is not the case here. At least two federal questions will most likely arise on remand to the trial court: whether the defamatory utterance must be made in face-to-face confrontation with the person defamed[1]; and whether the defamatory utterances in this case are of such virulent quality as to give rise, under the circumstances of their communication, to an immediate breach of the peace.[2] Thus, unless this appeal is dismissed, the risk arises that resolution of the federal questions necessary to a final determination of appellant's case will be arrived at in piecemeal fashion. *See, e.g., Flynt*, 451 U.S. at 621.

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[1] This is appellant's second question presented for review in this Court. However, since the question was neither pressed nor passed upon below, it is beyond this Court's jurisdiction. (*See*, Part I, *supra*). It would be logical to assume that, on remand, appellant will seek resolution of this issue.

[2] The charges against appellant allege that his defamatory communications were of such character. However, since the case has not yet gone to trial, appellee has not yet had the opportunity to present any evidence regarding the circumstances surrounding the dissemination of the leaflet and letter. Certainly, the evidence which would come out at the trial of this case will be indispensable to the determination of the tendancy of appellant's utterances to provoke a breach of the peace.

Moreover, this case does not fit within any of the categories discussed by this Court in *Cox*. The first is described as "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Cited as an example was *Mills v. Alabama*, 384 U.S. 214 (1966), where the appellant had no defense to the criminal charge other than his federal claim, and could not prevail on remand on any non-federal ground. Here, appellant has a state law ground on which to base a defense—that his defamatory utterances are true, and were communicated with good motives and for justificable ends. The result on remand, therefore, is not preordained.

In the second category are cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. Again, this is not the case here, since appellant's trial may result in a finding that the statements he published were not, in fact, true. Such a finding would obviate the federal questions he presents.

The third category includes

> those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts yet to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

420 U.S. at 481. It is true that if appellant were acquitted on remand, the federal issues would be mooted. However, if convicted, he would ultimately be able to obtain review in this Court of the federal issues he now presents, even if the state courts declined to reconsider what the Illinois Supreme Court has already decided. This Court has often taken jurisdiction on certiorari to decide issues determined at earlier stages of the state court proceedings, "and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case . . ." *Reece v. Georgia*, 350 U.S. 85, 87 (1955). *Accord, Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982); *Davis v. O'Hara*, 266 U.S. 314, 321 (1924). Thus, the questions presented here would survive the remand if appellant is convicted.

The fourth and final category is the only one arguably applicable here. It includes cases

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-483. It is true that if, on remand, appellant prevails on the merits on a nonfederal ground,

review of the federal issues would be unnecessary. It is also true that reversal of the Illinois Supreme Court would be preclusive of any further litigation. The question then becomes whether refusal to grant immediate review would "seriously erode federal policy."

As examples of cases which fall within this category, the *Cox* opinion lists *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), and *Construction Laborers v. Curry*, 371 U.S. 542 (1963). Each involved significant and important federal policies. The issue in *Tornillo* concerned the constitutionality of a state statute which required the media to publish a reply to an editorial critical of a candidate for public office, at the candidate's insistence. Thus, *Tornillo* involved " 'an important question of freedom of the press under the First Amendment' ", 418 U.S. at 247, n.6, while in this case, the issue concerns only the more discrete area of private defamation. In both *Langdeau* and *Curry*, other considerations besides the importance of the federal issue influenced the Court's decision, since in both cases the federal issue was separable from the merits and ripe for review. *See, Cox*, 420 U.S. at 483-485. Such is not the case here.

Similarly, in the decisions which follow *Cox*, this Court relied heavily on considerations above and beyond the significance of the federal question. *Calder v. Jones*, ____ U.S. ____, 104 S.Ct. 1482, 1484-1486 (1984) (federal issue was whether First Amendment considerations effected exercise of *in personam* jurisdiction over out-of-state publisher in defamation action, and if review not granted defendant would have to appear generally and waive jurisdictional defect); *Shaffer v. Heitner*, 433 U.S. 186, 195, n.12 (1977) (same); *Southland Corp. v. Keating*, ____ U.S.

____, 104 S.Ct. 852, 856-857 (1984) (California statute nullifying arbitration clause in contract between parties would be reviewed since, if parties forego arbitration and resort to court, federal issue would escape review); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (federal issue collateral to merits and ripe for review). On the other hand, where, as here, the federal question will survive the remand, and other federal questions may arise following the remand, this Court has postponed review until after the trial on the merits. *Flynt v. Ohio, supra.*

For these reasons, this Court should dismiss the appeal for want of jurisdiction.

III.

SINCE THE QUALIFIED TRUTH DEFENSE CONTAINED IN THE ILLINOIS CRIMINAL DEFAMATION STATUTE IS CONSISTENT WITH FIRST AMENDMENT PRINCIPLES AND THIS COURT'S FIRST AMENDMENT DECISIONS, NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[3] which the First Amendment embodies, this Court has held that statements published concerning a public official or public figure which are true may not result in the imposition of civil liability or criminal penalties against the speaker. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964). In so holding, however, this

[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Court expressly recognized that the considerations which prompted the *New York Times* decision—the interest in free and open debate on public issues—do not necessarily apply in the area of private defamation, where public affairs are not involved. *Garrison*, 379 U.S. at 72, n.8. Indeed, this Court had earlier held that the qualified truth defense to a criminal charge of private defamation was not unconstitutional. *Beauharnais v. Illinois*, 343 U.S. 250, 265-266 (1952). While *New York Times* and the subsequent public official and public figure cases have the effect of making *Beauharnais* inapplicable in that context, *Beauharnais* has never been overturned in the context of private defamation.

Appellant argues (Jurisdictional Statement at 7-8) that in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court held that liability for defamation of a private individual must be predicated on "defamatory falsehood." 418 U.S. at 347. As the Illinois Supreme Court correctly noted (104 Ill.2d at 149), appellant overstates the holding in *Gertz*. In the first place, the issue before this Court was a narrow one: "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements." 418 U.S. at 332. The falsity of the publication in *Gertz* was never in question, and so the opinion has no bearing on whether the States may criminally proscribe, consistent with the First Amendment, true defamatory statements, maliciously published. The holding in *Gertz* was that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 346-347. Tailored to

the issue presented, this holding simply says nothing about whether the falsity of the publication is an indispensable element of a private defamation action.

In the second place, this fact was confirmed a year later when this Court stated it had "carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 (1975). Appellant attempts to avoid the clear import of this statement in *Cox* by reference to a passing observation made in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) that "demonstration that an article was true would seem to preclude finding the publisher at fault . . ." 424 U.S. at 458. This, however, was no part of the decision in *Firestone*, since this Court's analysis of the issues there was predicated on its acceptance of the jury's finding that the publication was in fact false. *Id.* It cannot be assumed that with one sentence of dicta, this Court meant to close the question it had "carefully left open", *Cox, supra*, and completely overturn *Beauharnais* and "[t]he teaching of a century and a half of criminal libel prosecutions in this country . . ." *Beauharnais*, 343 U.S. at 265.

Finally, appellant asserts that the holding in *Gertz* that punitive damages may not be awarded in civil defamation cases unless the stringent standards of *New York Times* are met is "conclusive here." (Jurisdictional Statement at 8) He argues that punitive damages are the civil counterpart to criminal sanctions, and since they may not be imposed without a showing of falsehood and actual malice, then criminal sanctions may not be imposed upon a lesser showing. Again, this argument is belied by the

statement in *Cox*, the year after *Gertz* was decided, that the Court had not declared truth to be an absolute defense in private defamation cases. Moreover, the Court's concern in *Gertz* was with the near-limitless discretion juries have in awarding punitive damages, and the injustice of "securing for plaintiffs such as this gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349. This rationale does not logically extend to the purposes of criminal sanctions, and is therefore not conclusive here.

The First Amendment's guarantee of freedom of expression "was fashioned to ensure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Statements about a private individual concerning her personal life, uttered with the intent to cause injury and for malicious purposes, even if true, play no role in this constitutional framework. To adopt the position advanced by appellant would serve no compelling constitutional interest, and would open up the personal lives of every citizen to public inspection, ridicule, and contempt. Because the holding of the Illinois Supreme Court is consistent with First Amendment principles and with this Court's First Amendment decisions in the discrete area of private defamation, no substantial federal question is presented.

IV.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY APPELLANT'S CLAIM THAT THE STATUTE IS OVERBROAD AS REACHING DEFAMATORY STATEMENTS NOT SPOKEN IN FACE-TO-FACE CONFRONTATION WITH THE PERSON DEFAMED, SINCE THIS COURT HAS NEVER IMPOSED SUCH A REQUIREMENT.

In construing the reach of paragraph 27-1, the Illinois Supreme Court found that the statute "applies only to those words which by their very utterance tend to incite an *immediate* breach of the peace." 104 Ill.2d at 145 (emphasis in original). Such utterances have never been held to enjoy constitutional protection. *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Appellant argues that, even under the Illinois Supreme Court's interpretation, the statute is unconstitutionally overbroad because, whether viewed as a "fighting words" statute or a breach of the peace statute, it does not require face-to-face confrontation with the person defamed. The absence of this requirement, according to appellant, is fatal to the statute under this Court's decisions since without face-to-face confrontation there can be no threat of an "immediate" breach of the peace.

As set forth in Part I, *supra*, this argument is not properly before this Court since it was neither pressed nor passed upon below. In the Illinois Supreme Court, appellant argued only that the statute lacks a requirement of showing that the defamatory speech tended to provoke an immediate breach of the peace, not that without face-to-face confrontation there could be no immediacy.

Moreover, none of the decisions of this Court cited by appellant impose such a requirement. *Gooding v. Wilson*,

405 U.S. 518 (1972) holds only that a Georgia statute making it a crime to use offensive words tending to provoke a breach of the peace was overbroad because, as construed by the state courts, "offensive" language was not limited to language beyond the protection of the First Amendment. Therefore, this Court had no occasion to decide whether face-to-face confrontation is a constitutionally necessary element. Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), the narrow issue decided was whether a particular word was *per se* so offensive that the state should be permitted to remove it from the public vocabulary either because it was inherently likely to cause a breach of the peace, or upon a general theory or morality. 403 U.S. at 22-23. Even more inapposite are *Gregory v. Chicago*, 394 U.S. 111 (1969), *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Feiner v. New York*, 340 U.S. 315 (1951), each of which involved the protection afforded unpopular political speech against adverse crowd reaction. In these cases, the form of speech involved was unquestionably protected under the First Amendment. *Gregory*, *Cox*, and *Edwards* all involved peaceful protests against racial segregation, and *Feiner* involved a political speech. Defamation of a private individual does not share the First Amendment protection afforded such conduct.

Indeed, the only constitutional protection to which appellant asserts his conduct was entitled is that afforded truthful statements. He says "[a]t issue in this case are truthful statements." (Jurisdictional Statement at 13) But there has never been a judicial determination that what appellant published is true. It is not a fact that this Court can take cognizance of. If appellant wishes this Court to review the questions he presents, then it can only be done after a factual record has been developed at trial.

The Illinois Supreme Court has construed paragraph 27-1 in a manner which renders it constitutionally sound. Whether the statute applies to appellant's conduct is a matter which must be left to the State courts, where it can be determined precisely what that conduct was. If, after trial, the federal issues remain, then they can be reviewed on the basis of a complete record, instead of on the basis of assumed facts. Accordingly, no substantial federal question is presented at this time, and the appeal should be dismissed.

CONCLUSION

For all the foregoing reasons, appellee respectfully requests that this Court dismiss the appeal.

Respectfully submitted,

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